STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 14, 2006
v	No. 262581 Presque Isle Circuit Court
GEORGE EDWARD MCDONALD III, Defendant-Appellant.	LC No. 04-092207-FH

Before: Whitbeck, C.J., Saad and Schuette, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2), and second-degree home invasion, MCL 750.110a(3). Defendant was sentenced as a second habitual offender, MCL 769.10, to serve concurrent prison terms of 7 to 30 years for the first-degree home invasion and 78 months to 22½ years for second-degree home invasion. Defendant appeals as of right, and we affirm. This case is being decided without oral argument under MCR 7.214(E).

I. FACTS

This case concerns two home invasions of the same residence. The first occurred on October 8, 2004, when the residents were not home and gives rise to the second-degree home invasion charge. The second occurred on October 10, 2004, when the residents were present and gives rise to the first-degree home invasion charge.

On October 8th, defendant's car ran out of gas. While his car was sitting on the shoulder of the road, a Presque County deputy approached, and defendant fled into the woods. After a bystander identified the fleeing man as defendant, the county deputy then realized there was an outstanding warrant for his arrest. The county deputy began to search for him with the assistance of other officers, but they discontinued the search when it began to rain.

According to defendant, after becoming very wet and cold from the chase, he approached complainants' dwelling, knocked on the door, and broke the window with a rock when no one answered. He claimed he was looking for a blanket or something else to keep himself warm, and that he wanted shelter and to avoid the police. He took off his wet clothes, a sleeveless t-shirt and jeans, and put on clothes he found in the cabin. Defendant admitted to taking more clothing, a backpack, and a hatchet before leaving, though he denied stealing an electric heater, a billy

club, or a flashlight. Defendant testified that he stayed in the cabin for a "couple hours" until daybreak and that when he left the cabin, he walked ten miles to a friend's home, where he washed the clothing he was wearing.

On October 10th, complainants claimed that upon arriving at the cabin and unlocking the door, they noticed that "the place was a mess," with "beer bottles stacked all over the wood stove." They also noticed that the cabin was warm and that there were embers in the stove. Complainants also claimed there were several items missing, including a pair of shoes, a Bulls jacket, a Spartans jacket, a field jacket, a flashlight, a baton billy club, an electric heater, and a hatchet. Complainants decided to wait and see if the person who had broken in returned. Complainants testified to hiding their vehicles in the woods, turning off the lights, locking the gate, and placing a pie plate in the broken window to act as an alarm. Defendant returned and stuck his arm through the window, and complainants shined a flashlight on him. Complainants then went outside, yelled for defendant to halt, and fired a few rounds into the air. They then called 911. Defendant was eventually apprehended on October 11, 2004.

Defendant claims he never reached his arm in through the window upon his return and that the closest he was to the cabin was 6 to 7 feet away. But the complainants stated that a backpack that they found just outside the cabin window contained some of their missing property. Defendant does not dispute the second-degree home invasion charge. According to defendant, he went back to the cabin to return the items that he had previously taken and to retrieve his own clothing that he had left behind.

II. SUFFICIENCY OF EVIDENCE

Defendant argues on appeal that there was insufficient evidence to convict him of first-degree home invasion. We disagree.

A. Standard of Review

We review sufficiency of evidence challenges de novo to determine whether there was evidence sufficient to support a conviction. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). The evidence is viewed in the light most favorable to the prosecution to determine whether a rational trier of fact was justified in finding that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 260 Mich App 201, 207; 679 NW2d 77 (2003).

B. Analysis

MCL 750.110a(2) provides as follows:

> A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first degree

if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:

(a) The person is armed with a dangerous weapon.

(b) Another person is lawfully present in the dwelling.

Defendant argues that there was not sufficient evidence to show he intended to commit a felony in the dwelling. However, viewing the evidence in the light most favorable to the prosecution, a rational jury could find beyond a reasonable doubt that defendant, in returning to the dwelling with only some of the stolen items, was returning to steal more items. Considering that the dwelling was still warm when the complainants arrived (with embers still in the stove), a jury could reasonably infer that defendant had, in fact, been at the cabin earlier on October 10, 2004. Simply because defendant had some but not all of the items that were stolen in his possession upon his return does not mean that a jury could only find that he was returning the items. It is just as reasonable to conclude that he had these items on his person because he was, in essence, inhabiting the cabin and that he intended to break in and continue the pattern he had established, which included stealing items from the dwelling. Deferring to the jury's superior ability to assess witness credibility, it is apparent that the jury did not find defendant's testimony that he intended to return the items to be credible.

III. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that he was denied the effective assistance of counsel when his attorney failed to request separate trials on the two charges. Again, we disagree.

A. Standard of Review

There was no evidentiary hearing below regarding effective assistance of counsel, so our review is limited to errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

B. Analysis

MCR 6.210(B)(1) provides as follows:

Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on

(a) the same conduct or transaction, or

(b) a series of connected acts, or

(c) a series of acts constituting parts of a single scheme or plan.

If the offenses are not so related, the defendant is entitled to severance upon his own motion. MCR 6.120(C).

Defendant argues that his actions underlying each charge were not part of the same conduct. Specifically, he argues that while he entered the cabin on October 8, 2004, with the intent to steal, he entered on October 10, 2004, only to return the previously stolen items. However, as discussed above, there was evidence sufficient to find that he intended to steal when he returned to the cabin on October 10.[1] Accordingly, because defendant was not entitled to severance, he was not denied effective assistance of counsel when his attorney did not request separate trials. See *Hawkins*, *supra* at 457.

Affirmed.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Bill Schuette

[1] We also reject defendant's assertion that his actions were not part of a single plan or scheme. The evidence established that while running from the police, defendant broke into the dwelling, slept there, stole items, and drank the beer he found inside. He then returned two nights later and immediately went to the same window he used to enter the dwelling on October 8, 2004. He then started to enter the dwelling without ascertaining whether anyone was present. These facts suggest that defendant planned to continue to use the dwelling as a place to hide and intended to continue to use and take the items he found within.